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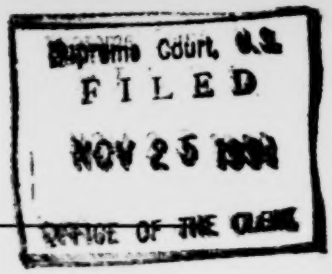

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991.

UNITED STATES OF AMERICA,
Respondent,

v.

RUSSELL A. WERME,
Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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November, 1991

QUESTION PRESENTED FOR REVIEW

Did the District Court err in not dismissing Count One of the Indictment for failure to state an offense against the United States of America, where Count One attempted to allege a conspiracy (18 U.S.C. s 371) to violate the Travel Act (18 U.S.C. § 1952(a)(3)), but was devoid of any allegations containing any elements or charging language of the Travel Act, including the required "unlawful activity" under 18 U.S.C. § 1952(b)?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals below (Pet. App. 1) is reported in 939 F.2d 108 (3rd Cir. 1991). The Memorandum and Order dated December 26, 1989 of the District Court below (Pet. App. 23) was not reported.

JURISDICTION

The judgment of the Court below (Pet. App. 45) was entered on July 30, 1991. Petitioner's Petition for Rehearing was filed on or about August 15, 1991. The order of the Court below denying Petitioner's Petition for Rehearing was entered on August 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the U.S. Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ...

U.S. Const. amend. V.

2. The Sixth Amendment to the U.S. Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

of the accusation; ...

U.S. Const. amend. VI.

3. One of the statutes under which Petitioner was prosecuted, 18 U.S.C. § 371, provides as follows:

> § 371. *Conspiracy to commit offense or to defraud United States.*
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 371 (1948).

4. The federal offense which the Petitioner was alleged to have conspired to violate was 18 U.S.C. § 1952(a)(3). The relevant text of 18 U.S.C. § 1952 provides as follows:

§ 1952. *Interstate and foreign or transportation in aid of racketeering enterprises.*

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --

***

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means

(1) any business enterprise involving gambling, liquor on which the federal excise tax has not been paid, narcotics or controlled substances (as defined in § 102(6) of the Controlled Substances Act, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States,

> (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or
>
> (3) any act which is indictable under subchapter II of Chapter 53 of Title 31, United States Code, or under Section 1956 or 1957 of this Title.

18 U.S.C. § 1952(a), (b) (1986).

5. The relevant test of the Pennsylvania commercial bribery statute referenced in Count Two of the Indictment against Petitioner provides as follows:

> § 4108. *Commercial bribery in breach of duty to act disinterestedly.*
>
> (a) Corrupt employe (sic), agent, or fiduciary. -
>
> A. An employe (sic), agent, or fiduciary commits a misdemeanor of the second degree when, without the consent of his employer or principal he solicits, accepts or agrees to accept any benefit from another person upon agreement or understanding that such benefit will influence his conduct in relation to the affairs of his employer or principal.
>
> ***

(c) Solicitation. -

A. A person commits a misdemeanor of the second degree if he confers, or offers or agrees to confer, any benefit the acceptance of which would be criminal under subsections (a) ... of this section.

18 Pa.Cons.Stat.Ann. § 4108 (1973).

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

On April 5, 1989, a Grand Jury sitting in the Eastern District of Pennsylvania, returned a two count indictment, charging Petitioner Russell A. Werme in Count One with conspiracy to violate the Travel Act (18 U.S.C. § 371), and in Count Two with a substantive violation of the Travel Act (18 U.S.C. § 1952(a)(3)). A superseding indictment (hereinafter referred to as "Indictment") was returned on September 6, 1989 (Pet. App. 50), alleging the same offenses, and was docketed as Criminal No. 89-00132, entitled *United States of America v. Russell A. Werme and Eugene L. Brault.*

Petitioner timely filed extensive pretrial motions seeking, *inter alia*, to dismiss the Indictment for failure to state an offense. The District Court denied Petitioner's motion by Memorandum and Order dated December 26, 1989 (Pet. App. 23). On March 13,

1990, after a trial lasting approximately three weeks, Petitioner was found guilty by a jury on both counts of the Indictment.

On June 1, 1990, the District Court entered a Judgment of Acquittal in favor of Petitioner as to Count Two.

On June 21, 1990, the District Court entered its Judgment, and Petitioner was sentenced to three years imprisonment on Count One, the imposition of which sentence was suspended, and Petitioner was placed on probation for a period of five years, conditioned upon 300 hours of community service and a fine of $10,000 (Pet. App. 45). This judgment and sentence was affirmed by the Court of Appeals for the Third Circuit, *United States of America v. Russell A. Werme*, No. 90-1485, 939 F.2d 108 (1991), from which Petitioner now brings a Petition to this Court for a Writ of Certiorari.

EXISTENCE OF JURISDICTION BELOW

The District Court had jurisdiction over the proceedings below pursuant to 18 U.S.C. § 3231.

ARGUMENT

While the Third Circuit Court of Appeals correctly stated the overall legal criteria for determining the sufficiency of a conspiracy indictment, it disregarded its own and other Circuits' law governing the determination of how the legal criteria are met and, for the first time, upheld the validity of a conspiracy

indictment which alleged no elements of the underlying substantive offense.

In declining to dismiss Count One of the Indictment for failure to state an offense, the District Court and the Court of Appeals rendered decisions in conflict with the following well-settled rules of law, in the Third Circuit and other Circuits, governing the determination of the sufficiency of an indictment:

(1) language in so-called "overt acts" of a conspiracy indictment cannot be borrowed to supply an element which is missing from the charging language of a conspiracy indictment; and

(2) language may not be "borrowed" from other counts in an indictment to remedy a deficiency in the count under scrutiny unless specifically incorporated by reference to the other count.

I. The charging and the Plan and Purpose paragraphs of Count One of the Indictment did not contain the elements of the offense of conspiracy to violate the Travel Act, and failed to sufficiently apprise Petitioner of the charge against him, because Count One alleges no elements of the Travel Act.

The Fifth Amendment to the Constitution provides, in part, that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ...". U.S. Const. amend. V. Under the Sixth Amendment, an indictment is legally insufficient unless

an accused in a criminal prosecution is informed of the nature and cause of the accusation against him. *Bartelli v. United States*, 227 U.S. 427 (1913). Rule 7(c) of the Federal Rules of Criminal Procedure, requires that an indictment provide "a plain, concise and definite written statement of the essential facts constituting the offense charged". Fed.R.Crim.P. 7(c). Thus, where an indictment fails to state an offense against the laws of the United States, the indictment fails to meet the requirements of Rule 7(c), and there then exists no valid indictment. If the District Court fails to dismiss the indictment, the defendant is thereafter "held to answer" for a crime in the absence of a valid indictment, in violation of the Fifth Amendment and the Sixth Amendment. More importantly, the failure of an indictment to state an offense against the laws of the United States deprives the District Court of its jurisdiction, as the District Court's jurisdiction under 18 U.S.C. § 3231 is limited to "offenses against the United States". 18 U.S.C. § 3231 (1948). The sufficiency of an indictment is measured by two criteria: (1) whether it contains the elements of the offense charged and sufficiently apprises the defendant of what he must be prepared to meet, and (2) whether it is specific enough to make a double jeopardy claim possible. *Russell v. United States*, 369 U.S. 749 (1962); *Hamling v. United States*, 418 U.S. 87 (1974); *United States v. Wander*, 601 F.2d 1251, 1258 (3rd Cir. 1979).

The gravamen of a charge under the Travel Act is use of an interstate facility with intent to violate certain federal or state laws. *United States v. Gordon*, 641 F.2d 1281, 1284 n. 6 (9th Cir.), *cert. denied*, 385

U.S. 815 (1966). "In a prosecution for conspiracy to violate the Travel Act, it is required that the aim of the conspiracy be an 'unlawful activity' *within the special definitional requirements of § 1952(b)*" (emphasis added). *United States v. Slawik*, 408 F.Supp. 190, 200 (D.Del. 1976), *aff'd*, 564 F.2d 90 (3rd Cir. 1977).

A. No allegation of interstate travel or use of interstate facilities.

To determine whether Count One of the Indictment (Pet.App. 50) states an offense, the charging and Plan and Purpose portions must be scrutinized, which consisted only of the following paragraphs:

> 8. Beginning at a time unknown to the grand jury but continuing from at least January 1983 to and including April 19, 1984, in the Eastern District of Pennsylvania and elsewhere, the defendants,
>
> RUSSELL A. WERME and
> EUGENE A. BRAULT,
>
> together with Timothy W. McCuen and other persons known and unknown to the grand jury, did conspire, combine, confederate and agreed to violate Title 18, United States Code, Section 1952(a)(3).
>
> PLAN AND PURPOSE OF THE CONSPIRACY
>
> 9. It was the plan and purpose of the

conspiracy that defendants RUSSELL A. WERME and EUGENE L. BRAULT on behalf of B&B, would and did obtain copies of bids containing confidential information, received by United Engineers from the competitors of B&B on the Seabrook contract. Defendants RUSSELL A. WERME and EUGENE L. BRAULT would and did obtain copies of bids received by United Engineers from the competitors of B&B prior to the time B&B actually submitted its bid to United Engineers.

10. It was further the plan and purpose of the conspiracy that defendants RUSSELL A. WERME and EUGENE L. BRAULT would and did confer on Timothy W. McCuen, money and other things of value in exchange for copies of the bids received from competitors of B&B by United Engineers for the Seabrook contract.

11. It was further the plan and purpose of the conspiracy that defendants RUSSELL A. WERME and EUGENE L. BRAULT on behalf of B&B, would and did review and utilize the confidential information contained in the bids received from the competitors of B&B by United Engineers in preparing the bid to be submitted to United Engineers by B&B, thereby assuring that B&B would submit the lowest bid for the Seabrook contract and unlawfully receive the

Seabrook contract from United Engineers.

The language in the charging and Plan and Purpose paragraphs of Count One contains *no* reference to use of interstate facilities or interstate travel. There is no "plain" or "definite" statement of this essential component of the conspiracy charge, not even a suggestion or a hint as to what interstate facility the defendant is alleged to have conspired to use or what interstate travel he conspired to cause. When an element of the underlying offense affects a substantial right and where specification of that element is necessary to establish the illegality of the behavior or the court's jurisdiction, it constitutes an essential part of an indictment. *See United States v. Hooker*, 841 F.2d 1225, 1229-30 (4th Cir. 1988). Without an interstate travel element, there is no federal jurisdiction and the conspiracy is not a conspiracy to violate a federal law.

The absence of any mention of interstate travel or use of interstate facilities in the charging and Plan and Purpose language of Count One is a fatal defect in a Travel Act conspiracy case. Did the Grand Jury intend to charge conspiracy to travel, conspiracy to use facilities of interstate commerce, neither of these activities, or both? Interstate activity is the linchpin of the Travel Act and the basis of federal jurisdiction over the illegal activity under state law that it prohibits. *Id.* at 1227-1229. At an absolute minimum, a conspiracy count must at least allege an agreement and specific intent to commit an unlawful act. *Wander,* 601 F.2d at 1259. A Travel Act conspiracy condemns an agreement to travel interstate or use an interstate facility with

intent to promote specified unlawful activity, 18 U.S.C. § 1952(a)(3) (1986), and not merely the unlawful activity allegedly being carried on through the interstate travel.

B. Absence of any alleged specific unlawful acts.

In addition to the absence of any reference to interstate facilities or travel, the pertinent paragraphs of Count One fail to describe any specific unlawful acts. The Plan and Purpose paragraphs (paragraphs 9, 10, and 11), allege the receipt and use of bid information to obtain contracts and the conferring of money and other things of value on McCuen in exchange for the bids. None of these activities is described as unlawful in these paragraphs. In fact, the only place where the word "unlawfully" appears is in paragraph 11 as a modifier describing the receipt of the contract by B&B Insulation, Inc. However, alleged unlawful receipt of a contract does not constitute one of the unlawful activities included within the ambit of the Travel Act, 18 U.S.C. § 1952(b)(2) (1986).

The underlying unlawful activity need not be described with great particularity. However, in this case, the applicable indictment language describes conduct that is not, per se, unlawful, there is no characterization of it as unlawful, and no specific state statute is mentioned or identified. The actions alleged in the Plan and Purpose paragraphs do not constitute commercial bribery under Pennsylvania state law. *See* 18 Pa.Cons.Stat.Ann § 4108 (1983). In short, the type

of illegal activity which the defendant is alleged to have conspired to commit is not made clear. Count One is neither "plain" nor "definite". Fed.R.Crim.P. 7(c)(1). It is flagrantly poor draftsmanship, well below the standard this Court should consider acceptable for government pleadings in criminal cases where defendants are entitled to clarity and specificity in the charges brought against them.

II. The lower court, while correctly stating the law concerning standards for determining sufficiency of a conspiracy indictment, reached its result by ignoring other judicial rules of construction.

In its opinion, the Third Circuit correctly stated that in reviewing the sufficiency of the Indictment, a *de novo* determination is made whether the Indictment contains each element of the offense charged, sufficiently apprises the defendant of the crime he should be prepared to meet, and whether the Indictment is specific enough to make a plea of double jeopardy possible. *United States v. Werme*, 939 F.2d 108, 112 (3rd Cir. 1991). The opinion goes on to correctly point out that a conspiracy indictment need not allege all of the elements of the offense which the defendants are conspiring to commit, because in a conspiracy count the conspiracy is the gist of the offense and, while the indictment must allege every element of the crime of conspiracy, it need not plead every element of the substantive offense, but must put the defendants on notice that they are being charged with a conspiracy to commit the underlying substantive offense. *Id.* at 112, *citing United States v. Knox Coal*

Co., 347 F.2d 33 (3rd Cir.), *cert. denied*, 382 U.S. 904 (1965).

The Court held that some elements of the underlying offense must be pled, and that if the charging language had simply alleged that Werme "conspired to violate 18 U.S.C. § 1952(a)(3) that it would be legally insufficient". *Id.* at 112 n. 1. In the same footnote, the Court states "This problem, however, does not exist in this case; for the paragraphs set forth in the Plan and Purpose section of the conspiracy count (which are considered part of the 'charging language,' *see supra* at 111) clearly reveal that Werme is charged with conspiracy to promote *commercial bribery* through interstate activity (*see supra* at 112)" (emphasis added). *Id.* at 112 n. 1. As mentioned above, however, the charging language in the subject indictment nowhere mentions the words "bribe", "commercial bribery", "interstate", "travel", or "use of interstate facilities". The footnote fails to explain how the Plan and Purpose section of the conspiracy count "clearly reveal" conspiracy to promote commercial bribery through interstate activity. The footnote fails to explain how conspiracy involving interstate activity is alleged, where no words connotating interstate activity are present. Although language present in paragraphs 8-11 of the Indictment might suggest bribery, the language also suggests bid rigging (e.g., "unlawfully obtain the Seabrook project" as contained in paragraph 11). There is no citation in Count One to any commercial bribery statute, and in any event, the elements of the Pennsylvania commercial bribery statute are quite different from the language employed in the

Indictment.

From the foregoing, it is apparent that the so-called "charging language" of the Indictment does not "clearly reveal" anything, and gives no support to the legal analysis conducted by the Court. Since the Court expressly found no comfort in the citation to 18 U.S.C. § 1952(a)(3), how did the Court reach the result it reached? The only way the Court of Appeals could have reached this result was either by transferring allegations of travel and/or use of Western Union from the Overt Acts into the charging portion of the Indictment, or by incorporating allegations of travel and commercial bribery from Count Two of the Indictment. As will be seen below, no Court of Appeals has approved the former technique and only one circuit has approved the latter technique, in a circumstance quite distinguishable from the case at bar.

In scrutinizing the sufficiency of a conspiracy count, two Circuits have held that allegations contained under the heading of overt acts in that count may not be used to remedy any insufficiency in the charging section of a conspiracy count. Overt acts are acts in furtherance of a conspiracy and are not necessarily the subject or object of the illegal agreement. *Wander, supra,* 601 F.2d at 1259; *Knox Coal Co., supra*, 347 F.2d at 38; *United States v. Pheaster*, 544 F.2d 353, 361 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977). No cases holding to the contrary have been found. Similarly, the technique of incorporation of allegations in other counts in a multi-count indictment to remedy a deficiency in the count under scrutiny, absent a specific incorporation

by reference, has been rejected by the Second, Fourth, Fifth, Ninth and Tenth Circuits. *United States v. McGuire*, 381 F.2d 306, 319 (2nd Cir. 1967), *cert. denied*, 389 U.S. 1053 (1968); *Hooker, supra, 841 F.2d at 231; United States v. Hajecate*, 683 F.2d 894, 901 (5th Cir. 1982), *cert. denied,* 461 U.S. 927 (1983); *Davis v. United States,* 357 F.2d 438, 440 & n. 2 (5th Cir.), *cert. denied,* 385 U.S. 927 (1966); *Walker v. United States*, 176 F.2d 796, 798 (9th Cir. 1949); *McClintock v. United States*, 60 F.2d 839, 840 (10th Cir. 1932). To hold otherwise would allow courts to merely guess what a Grand Jury intended.

In *United States v. Esposito*, 771 F.2d 283 (7th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986), the Seventh Circuit used allegations from other counts in an indictment to cure defects in other counts, but under very limited circumstances.[1] In that case, four travel act counts of the indictment failed to allege that, after travelling, the defendants performed a specific unlawful act of extortion. However, the defendants were also charged with violations of the Hobbs Act, i.e., affecting commerce by extortion, and the extortion alleged in the Hobbs Act counts specifically correlated to the extortion acts not alleged in the Travel Act counts. The Travel Act counts were upheld by the Seventh Circuit as providing adequate notice by a reading of the

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[1] **Prior to the Seventh Circuit's holding in *Esposito*, the Seventh Circuit was totally aligned with holdings on this point in all of the other Circuits. *See United States v. Gordon*, 253 F.2d 177, 180 (7th Cir. 1958).**

indictment as a whole, because the missing elements were necessarily contained in the Hobbs Act counts. *Id.* at 288.

The holding in *Esposito* is readily distinguishable from the case at bar. In *Esposito*, the indictment was only attacked on appeal, and no lack of notice was complained of below. In the case at bar, the Indictment was attacked at every stage of the proceeding; actual harm due to lack of notice was asserted prior to trial, during trial and, of course, thereafter. Where the question of insufficiency is first raised on appeal, the courts tend to impose a stricter standard upon the defendant. *Hagner v. United States*, 285 U.S. 427 (1932); *United States v. Wabaunsee*, 528 F.2d 1 (7th Cir. 1975); *Finn v. United States*, 256 F.2d 304 (4th Cir. 1956); *Hooker, supra*, 841 F.2d at 1229.

The analysis conducted by the Court in *Esposito, supra*, is unavailing in the case at bar, because a review of the overt acts in the conspiracy count and the allegations in Count Two do not, unlike *Esposito*, compel a particular result. Based upon the Overt Acts in Count One and the language of Count Two, the missing interstate element could be conspiracy to travel, conspiracy to use interstate facilities, or conspiracy to do both. Where the language in the other counts does not necessarily establish the identity of the particular missing element, the analysis constitutes mere guesswork as to the Grand Jury's intent. Thus, even *Esposito* does not stand for the proposition that the Indictment is valid. *Esposito, supra*, at 289.

The case at bar is absolutely indistinguishable from *Hooker, supra*, where an indictment charging conspiracy to violate 18 U.S.C. § 1962(c) was struck down for failing to alleged the essential element of an effect on interstate commerce. The only way it can be distinguished is to improperly indulge in the "borrowing" of language elsewhere in the Indictment to remedy defects in the charging paragraphs of Count One. This practice, as seen above, which has never been utilized heretofore to sustain an indictment which was duly objected to prior to trial. Since the Court of Appeals of necessity had to find missing language elsewhere to reach the result it reached, its holding in the case at bar cannot be reconciled with decisional law in the Third Circuit or any other Circuit.

CONCLUSION

The District Court's Order denying Petitioner's Motion in Arrest of Judgment, and the judgment of the court of appeals affirming the District Court's Judgment, should be reversed, as Count One of the Indictment fails to state an offense against the United States of America.

Respectfully submitted,

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